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Reconsideration of pending Claims 1-29 is respectfully requested, in view of the Amendments and Remarks set forth below.

### REMARKS

#### I. Status of the Claims

Claims 1-29 are pending in this application, of which Claims 1, 28, and 29 are the pending independent claims, with Claims 2-27 being the pending dependent claims. In the Office Action of April 15, 1996, all claims stand rejected.

This Amendment under 37 CFR 1.111 is in response to all of the rejections of pending Claims 1-29.

Before turning to the arguments in response to the outstanding rejections of the pending claims, Applicants note that all of the 35 USC 112 rejections asserted in the Office Action of August 22, 1995, have been withdrawn in view of Applicants' amendments and arguments in the Amendment under 37 CFR 1.111 filed January 22, 1996. Moreover, the only prior art rejection in the April 15 Office Action, i.e., the 35 USC rejection of Claims 1-29 over DUDENHOEFFER, was also withdrawn in view of arguments asserted in the amendment filed January 22, 1996. It appears from the record that the April 15 1996 Office Action was not made final because it is stated as being a new ground of rejection, which it of course is. Thus, Claims 1-29 currently stand rejected as obvious over USP 4770731 (to Ferguson) in view of USP 5234731 (also to Ferguson).

#### II. The Rejection of Claims 1-29 under 35 U.S.C. 103, as Obvious over FERGUSON I in view of FERGUSON II

In the April 15 Office Action, the Examiner rejects Claims 1-29 under 35 U.S.C. 103, as unpatentable over USP 4,770,731, to Ferguson, (i.e. "FERGUSON I") in view of USP 5,234,731 (i.e., "FERGUSON II"). The Examiner states that FERGUSON (presumably, FERGUSON I) discloses a patch to be used with a heat shrinkable bag; that the patch is heat shrinkable with the bag to reduce the tendency of delamination; that the

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patch is comprised of two outer layers and two inner layers, and that the outer layers are comprised of 87% by weight linear low density polyethylene, ethylene-vinyl acetate, pigments and additives and the inner layers comprise ethylene-vinyl acetate copolymer; and, that the linear low density polyethylene has a density of 0.900 to 0.935 g/cc. The Examiner then acknowledges that FERGUSON (again, presumably FERGUSON I) does NOT disclose: (1) the linear low density polyethylene as being a long chain branched homogeneous ethylene alpha olefin copolymer, AND (2) that the bag is made of long chain branched homogeneous ethylene alpha olefin copolymer.

The Examiner then turns to FERGUSON II, and states that FERGUSON II discloses a heat-shrinkable bag that is made of a copolymer of ethylene and alpha-olefin. The Examiner then proceeds to conclude that it would have been obvious for one skilled in the art at the time of the invention to use the FERGUSON patch (presumably, FERGUSON I) in combination with the FERGUSON bag (presumably, FERGUSON II) because the reference (presumably, FERGUSON II) discloses the bag as having excellent abuse resistant properties.

The Examiner goes on to take account of the various recitations in dependent claims. That is, the Examiner then states that as to the polymer being long chain branched homogeneous polymer (Claims 6 and 7), this limitation is not deemed to be patentably significant because both the process of making homogeneous ethylene alpha olefin copolymer and the product are known in the art as admitted by Applicant in the specification, and that since the process is known and the product is commercially available, it would have been obvious for one skilled in the art to select the material which would give optimum properties to the product being made. The Examiner then states that the use of homogeneous ethylene alpha olefin in the claimed invention is not the point of novelty in the instant application, and that both FERGUSON I and FERGUSON II teach the use of copolymer of ethylene and alpha olefin, and that they (i.e., FERGUSON I and II) do not restrict the polymer to homogeneous or heterogeneous, and that it therefore would have been obvious to use the one which is best suited

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for the product being made. The Examiner then states that the use of adhesive to adhere the patch to the bag as claimed in Claim 2 is conventional and would have been obvious to one skilled in the art; that the amount of shrink claimed in Claims 8-10 is seen as nothing more than optimization which is well within the skill of one in the art, and that it would have been obvious to provide a patch which shrinks at a rate which is compatible with the bag, and that it would have been obvious to put additional patches on the bag if one desires to increase the strength of the patched area of the bag.

In response, Applicants contend that Claims 1-29 are patentable over FERGUSON I in view of FERGUSON II. Applicants agree that FERGUSON I does disclose a patch bag having a shrinkable patch adhered to a shrinkable bag, with the FERGUSON I patch comprising two outer layers and two inner layers, the outer layers comprising 87% linear low density polyethylene (LLDPE), which has the disclosed density of 0.900 to 0.935 g/cc. However, Applicants point out that Claim 1 of the instant application recites the "first film," i.e., the patch film, as comprising a *homogeneous* ethylene/alpha-olefin copolymer. Applicants further contend that those of skill in the art are well aware that there is a *structural difference* between LLDPE and homogeneous ethylene/alpha-olefin copolymers. Applicants further contend that although homogeneous ethylene/alpha-olefin copolymers have been commercially available since about 1990, the mere availability of such copolymers does NOT render the recitation of such copolymers "not...patentably significant." Rather, no prima facie case of obviousness has been made out in the April 15 Office Action because the Office Action does not indicate that either FERGUSON I and/or FERGUSON II disclose *homogeneous* ethylene/alpha-olefin copolymer, and the Office Action also does not provide any motivation to substitute homogeneous ethylene/alpha-olefin copolymer for the LLDPE in the patch film disclosed by both FERGUSON I and FERGUSON II, or any suggestion to make such a modification.

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More particularly with respect of the failure of the April 15 Office Action to set forth a prima facie case of obviousness, Applicants respectfully direct attention to MPEP 706.02, which sets forth the following:

35 U.S.C. 103 authorizes a rejection where to meet the claim, it is necessary to modify a single reference or to combine it with one or more others. After indicating that the rejection is under 35 U.S.C. 103, there should be set forth (1) the difference or differences in the claim over the applied reference(s), (2) the proposed modifications of the applied reference(s) necessary to arrive at the claimed subject matter, and (3) an explanation why such proposed modification would be obvious. [MPEP 706.02]

The Office Action attempts to deal with Applicants' recitation of a homogeneous ethylene/alpha-olefin copolymer by first implying that homogeneous ethylene/alpha-olefin copolymer is a type of LLDPE, which it is not. LLDPE is a heterogeneous polymer, not a homogeneous polymer. Homogeneous polymers are structurally different from heterogeneous polymers, as is expressly stated in Applicants' specification:

In contrast to heterogeneous polymers, homogeneous polymers are polymerization reaction products of relatively narrow molecular weight distribution and relatively narrow composition distribution. Homogeneous polymers are useful in various layers of the patch bag of the present invention. Homogeneous polymers are structurally different from heterogeneous polymers, in that homogeneous polymers exhibit a relatively even sequencing of comonomers within a chain, a mirroring of sequence distribution in all chains, and a similarity of length of all chains, i.e., a narrower molecular weight distribution. Furthermore, homogeneous polymers are typically prepared using metallocene, or other single-site type catalysis, rather than using Ziegler Natta catalysts. (Applicants' specification, Page 12 line 25 through Page 13 line 3.)

Since LLDPE and homogeneous ethylene/alpha-olefin copolymer are polymers which are *structurally different* and *mutually exclusive* of one another, clearly the disclosure of LLDPE is not enough to render the use of Applicants' recited homogeneous ethylene/alpha-olefin copolymer obvious. Moreover, Applicants admission that homogeneous ethylene/alpha-olefin copolymers are known and available also does not reduce the recitation of homogeneous ethylene/alpha-olefin copolymer to the level of patentable

insignificance.<sup>1</sup> *At most*, this would render the substitution of homogeneous ethylene/alpha-olefin copolymer “obvious to try.” It is black letter law that obvious to try is not the standard of patentability today. That is, obvious-to-try is not obvious under the law.

There are four concurrent sentences on Page 3 of the 15 April Office Action which appear to succinctly isolate the Examiner’s reasoning, and are as follows:

Since the process is known and the product is commercially available, it would have been obvious for one skilled in the art to select the material which would give the most optimum properties to the product being made. The use of homogeneous ethylene alpha olefin in the claimed invention is not the point of novelty in the instant application. Both of the Ferguson references teach the use of copolymer of ethylene and alpha olefin; they do not restrict the polymer to homogeneous or heterogeneous. Therefore, it would have been obvious to use the one which is best suited for the product being made.

Although Applicants do disagree with many of the facts set forth in the above passage, Applicants want to emphasize their strong disagreement with the underlying logic of this passage. First, knowledge and commercial availability of the resin do NOT render the resin obvious to select. There must be some motivation to make the selection. Mere knowledge is NEVER motivation. The only motivation of record is to be found in Applicants’ specification, e.g., Applicants have unexpectedly discovered that this resin provides surprisingly high impact strength. Since, as pointed out above, homogeneous ethylene/alpha-olefin copolymer is NOT a type of LLDPE and is mutually exclusive of LLDPE, the disclosure of LLDPE in FERGUSON I is not a disclosure of a genus which is inclusive of any homogeneous ethylene/alpha-olefin copolymer. Thus, it is erroneous to assert that the substitution of homogeneous ethylene/alpha-olefin copolymer is a mere *selection* of an optimal polymer from the various types of polymers disclosed in

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<sup>1</sup> In fact, Applicants contend that each and every structural recitation of each and every claim to their patch bag and packaged product (both of which are articles of manufacture under 35 USC 101) are of patentable significance. That is, with regard to structural recitations in an article claim, Applicants contend that as a matter of general principle, *all* such recitations must be considered in any evaluation of the patentability of the claimed subject matter.

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FERGUSON I or FERGUSON II. One cannot select the recited member (i.e., homogeneous ethylene/alpha-olefin copolymer) from a group which does not contain the member (LLDPE). Thus, selection-to-achieve-optimization logic in the Office Action relies upon a premise (i.e., that there is a type of LLDPE which is a homogeneous ethylene/alpha-olefin copolymer) which is factually incorrect. Thus, the Office Action cannot possibly set forth a prima facie case of obviousness, because the premise underlying the conclusion of obviousness is a premise which is clearly in error.

As to the statement that "...Both of the Ferguson references teach the use of copolymer of ethylene and alpha olefin; they do not restrict the polymer to homogeneous or heterogeneous....," Applicants contend that the mere disclosure of ethylene/alpha-olefin copolymer is not enough to render homogeneous ethylene alpha-olefin copolymer obvious. There are ethylene/alpha-olefin copolymers which would not produce the results of either LLDPE or homogeneous ethylene/alpha-olefin copolymer. Neither FERGUSON I nor FERGUSON II appears to provide any teaching or suggestion directed to homogeneous ethylene/alpha-olefin copolymers...and the Office Action also does not point out any teaching or suggestion in FERGUSON I or FERGUSON II. Until and unless some motivation or suggestion for substituting homogeneous ethylene/alpha-olefin copolymer for the LLDPE of FERGUSON I, no prima facie case of obviousness has been made or can be made.

As to the sentence containing the phrase "point of novelty," Applicants contend that any "point of novelty" analysis is entirely irrelevant to any patentability analysis under existing U.S. patent law. The claims under examination each recite a combination of features, with the patentability residing in the combination. Patentable invention resides in both the selecting and combining the various recited features. To focus on any one recited feature, while ignoring the remaining recited features, is to ignore the fact that the patentable invention resides in the combination, not a single recited feature.

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Even if a prima facie case of obviousness has been made out, which is not the case, Applicants further contend that their application, as filed, contains evidence of unexpected results. More particularly, Applicants once again direct attention to their Examples 1, 2, 5, 6, 10, 11, 12, 13, and 14, and accompanying tables, which disclose various heat shrinkable films comprising homogeneous polymer as having an impact strength comparable to linear low density/EVA blends, which is very good considering that LLDPE/EVA may be the most impact resistant formulation in commercial use in the prior art. Certainly this result is unexpected, and supports the nonobviousness of Applicants' claimed invention over FERGUSON I in view of FERGUSON II, just as these results have already supported the nonobviousness of Applicants' claimed invention over DUDENHOEFFER et al.

Moreover, as in the response to the rejection based on DUDENHOEFFER et al., Applicants direct attention to particular dependent claims which recite a further basis of patentability: long chain branched homogeneous polymers. Based on the arguments set forth in the paragraph immediately above, Applicants contend that Claims 6 and 7, each of which recites a long chain branched homogeneous ethylene/alpha-olefin copolymer, is patentable over FERGUSON I in view of FERGUSON II, neither of which appear to specifically disclose such a *long chain branched* homogeneous ethylene/alpha-olefin copolymer, and Applicants have discovered that such polymers are particularly useful for the manufacture of a heat shrinkable films for use in patch bags, both for the patch film as well as for the bag film, as Applicants have discovered that such *long chain branched* homogeneous polymers not only have the melt strength to undergo a cast process followed by orientation to result in a heat shrinkable film, they also provide a relatively high level of impact strength. The Office Action makes no mention of the motivation to arrive at the use of such *long chain branched* homogeneous ethylene/alpha-olefin copolymer. Accordingly, on this

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additional basis, Applicants again contend that the Examiner has further failed to make out a prima facie case of obviousness of Claims 6 and 7.

Applicants contend that the additional dependent claims which have not been specifically argued above recite various features which stand as a further basis for the patentability of Applicants' invention. However, Applicants elect not to argue these various features at this time, instead relying on the arguments as set forth above. Applicants reserve the right to argue these further features at any future date.

### III. THE SUPPLEMENTAL INFORMATION DISCLOSURE STATEMENT

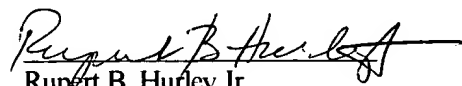
Applicants direct attention to the supplemental Information Disclosure Statement filed concurrently herewith. Applicants respectfully request that the items listed on the PTO-1449-type form included with the IDS be considered by the Examiner, and that, in the next communication from the Examiner, that the Examiner initial this form in a manner indicating that each of the listed items has been considered relative to the patentability of Applicants' claims.

### IV. CONCLUSION

In view of all of the foregoing arguments, it is respectfully submitted that claims 1-29 are patentable over the prior art, and in condition for allowance. Withdrawal of the rejections set forth in the April 15, 1996 Office Action is respectfully requested, with a favorable view towards the allowance of Claims 1-29.

If the Examiner has any questions or otherwise needs to discuss any matters related to this application, the Examiner is invited to call the undersigned at the telephone number provided below.

Respectfully submitted,

  
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